No. 10,190

In the

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

Appellants' Memorandum of Points and Authorities Relied Upon In Opposition to Motion to Dismiss Certain Appeals

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Appellees, Hermosa Amusement Corporation, Ltd., and J. M. Andersen, parties in each of the fourteen cases, move to dismiss the appeals in this cause other than the appeal in the main proceeding. Their motion is based upon two grounds, (1) lack of summons and severance as to libel-

ants and/or intervening libelants "named in the decrees* appealed from", and (2) the lack of necessary parties "in the decrees* appealed from."

I.

FACTS.

"Without prejudice to any other matter", counsel for Hermosa Amusement Corporation, Ltd., and J. M. Andersen stipulated that the decrees to be entered in causes B, D, E, F, G, H, I, J, L and M, made "reasonable awards" to the several claimants. These were respectively the Mayo, Karsh, Johnson, Montgomery, Elliott, Culp, Greenwood, McGrath, Anderson and Sylvester decrees. (Stipulation, Ap. I, pp. 140-144) (Appellees' motion, pp. 2 and 3). Only the Berger, Ohiser and Rasmussen decrees were not covered by this stipulation. They are designated respectively C, K and N. Thus it appears that in ten of the causes the amount of damages was fixed by agreement between appellants and the libelants or intervening libelants upon appellees' stipulation in this cause that the amounts so stipulated were "reasonable awards for the above described damages suffered by the respective libelants, occasioned by the collision."

It was also stipulated (Ap. I, pp. 277, 278) that the record on appeal in cause A, the main proceeding as to which no motion to dismiss is presented, should consist of the following documents among others:

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*Italicized additions ours.

"11. Amended petition to bring in third party respondents filed May 13, 1941. (Ap. I, pp. 55-71)

* * *

"14. Answer to amended petition to bring in third party respondents. (Ap. I, pp. 75-89)

* * *

"17. Answer of third party respondents to intervening libels. (Ap. I, pp. 97-108)

"18. Amendment to amended petition to bring in third party respondents and order authorizing the same dated September 19, 1941." (Ap. I, pp. 108, 109)

All of the above documents are stipulated to be a part of the record in cause A, the main case, to which the motion to dismiss is not directed. (Appellees' motion, p. 6) The amounts of the stipulated decrees are also, as above noted, disclosed by the record in the main cause. (Ap. I, pp. 140-144; id. p. 278) In the said main cause appellants assigned as error the failure of the District Court to enter judgment in favor of them "on the petition under the 56th Admiralty Rule in the above entitled and consolidated causes." (Ap. I, p. 251) No error was assigned by appellants as to the amounts awarded by the decrees in causes C, K and N, or in any other case except cause A, and that assignment of error was withdrawn. (Ap. I, pp. 272-273)

It appears to us that the portion of the record on appeal in cause A alone, as to which no motion to dismiss is made, is adequate to a determination as between appellants and appellees of all matters arising in that cause and in each of the consolidated causes. As between appel-

lees who make this motion and appellants and all parties to the consolidated causes, a reversal of the judgment below would leave open to the further contention of such appellees only the amounts of the decrees in causes C, K and N, in which the amounts were not stipulated.

The present motion to dismiss is presented to this Court despite the stipulation signed by all proctors for appellees now making such motion:

> "A. That the appeals in the above entitled causes *may and shall* be consolidated and *heard, considered* and *determined* together.*
>
> "B. That the record and Apostles on appeal heretofore consolidated by stipulation and order, may be printed in one consolidated record.
>
> "C. That a single set of briefs may be served and filed by the appellants and that a single brief may be served and filed by the appellees, covering all of the appeals in said causes and based on said consolidated record." (Ap. III, pp. 1416, 1417)

That stipulation is captioned in this court and cause and its title refers to consolidated cases. (Ap. III, p. 1415)

II.

POINTS AND AUTHORITIES.

(a) The Doctrine of Summons and Severance is Obsolete.

Counsel concede at the outset that the Federal Rules of Civil Procedure (Rule 74) abolish the necessity for summons and severance and state that such rules have no

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*Emphasis supplied.

application in admiralty. They do not point out, however, that Rule 48 of the General Rules of the Supreme Court adopted in 1939 provides:

> "Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for a writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately, or any two or more of them may join in an appeal or petition."

(Except for reference to petition for certiorari, this rule is the same as Rule 74 of Federal Rules of Civil Procedure.)

Rule 9 of this Circuit provides:

> "The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable."

The doctrine of summons and severance appears to have originated in

> *Williams v. Bank of the United States* (1826) 24 U.S. 414, 6 L. ed. 508,

a decision of Marshall, C.J. It was brought more forcefully to the attention of the bar by the opinions of Mr. Justice Miller in

> *Masterson v. Howard* (1869) 10 Wall. 416, 19 L. ed. 953,

and of Mr. Justice Blatchford in

> *Estes v. Trabue* (1888) 128 U.S. 225, 32 L. ed. 437, 9 S. Ct. 58.

The decisions in the above cases and other decisions in actions at law and in equity were followed in like actions

in the several Circuit Courts of Appeals. They were followed in admiralty in the Fifth Circuit only. Decisions of the Fourth, Sixth and Ninth Circuits had not applied the technical doctrine. See note to

Hartford A. & Ind. Co. v. Bunn (1932) 285 U.S. 169, 76 L. ed. 685, 52 S. Ct. 354,

published in

1932 A.M.C. 854-858.

The decision in admiralty in this Circuit in which the doctrine of summons and severance was held inapplicable was

Perriam v. Pacific Coast Co. (1904) 133 F. 140 (C.C.A. 9).

This case and those from the other Circuits held that a stipulator against whom a joint decree was rendered did not become a party to the action. Yet it was patent that such a surety's rights would be as much affected by a reversal as those of the principal.

The change in practice effected by the adoption of the Federal Rules of Civil Procedure was noted by this court in

Tighe v. Maryland Casualty Co. (1938) 99 F. (2d) 727 (C.C.A. 9)

but such rules were held inapplicable to an appeal pending prior to their effective date. The change in the rule as to summons and severance was, however, apparently not noted here in the decision of

Interstate Oil Co. v. Gormley (1939) 105 F. (2d) 431 (C.C.A. 9)

but in that case the court indicated that it would *sua sponte* issue citation to any necessary party if the appeal then before it appeared well founded. This decision accords with the spirit of the decision in

In re Barnett (1942) 124 F. (2d) 1005 (C.C.A. 2)

where the court said, at page 1009:

> "We have jurisdiction in the premises. Several courts have recognized that, where reversal of a judgment wipes out all basis for recovery against a non-appealing, as well as against an appealing, defendant, the reversal may operate to the benefit of both. Kline v. Moyer, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406; Gebbhardt v. Village of La Grange Park, 354 Ill. 234, 188 N.E. 372; Maryland Casualty Co. v. City of South Norfolk, 4 Cir., 54 F. 2d 1032; and cf. Merchants Discount Corp. v. Federal Street Corp., 300 Mass. 167, 14 N.E. 2d 155, 118 A.L.R. 412; Rowell v. Ross, 89 Conn. 201, 93 A. 236; 5 C.J.S., Appeal & Error, Sec. 1920, p. 1423; 3 Am. Jur. 695; Shreeder v. Davis, 43 Wash. 129, 86 P. 198, 10 Ann. Cas. 80; L.R.A., N.S., 310.
>
> "In such a case as this, we should, then, consider the parties to the order below as before this court, at least to the extent that where modification of the judgment affecting them is necessary in order to afford proper and adequate relief to appellant, they are bound thereby."

It appears to us that in the light of the foregoing authorities, were this motion otherwise well-founded it would be an anomaly and an anachronism for this court to follow a doctrine repudiated by the very court which announced it and in virtue of whose decisions it has

filtered down through the several circuits. The decisions cited by appellees indicate that the objection of want of necessary parties is but one of the aspects of the old doctrine of summons and severance.

(b) The Interests of Appellees Other Than Those Making the Present Motion Were Clearly Several.

It is perfectly plain that appellees Hermosa and Andersen had no property right or interest in any amount which the decrees under review awarded to any of the Olympic II's passengers or crew. Any might have failed to sue or intervene and the action would not have abated because the claims of the several injured parties were not joint. The decrees cannot be joint in substance, as appellees assert, when the claims are not so in fact. All that is "joint" is the fact that certain common questions of law and fact were presented which could be conveniently disposed of in one proceeding.

But even the issues of law and fact were not entirely identical, as appellees infer. It was quite possible as to the legal issues that the court determine that the Olympic II's condition as to maintenance and seaworthiness was the sole proximate cause of the loss to her owners. It would not follow from this that her negligence would be imputed to her passengers and even perhaps to her crew so that they, or their representatives, could not recover from the Sakito Maru if she were in fault for their unfortunate losses. Likewise as to facts—proof that Culp and Greenwood lost their lives, essential to the individual claims of their representatives, was not in any way pertinent to the establishment of any claim of the Hermosa

Amusement Corporation, Ltd., or J. M. Andersen against the appellants.

The record indicates (Ap. I, pp. 282-288; Ap. III, p. 1425) that citations issued in the consolidated causes and were served on appellees presenting this motion.

In the light of the foregoing we respectfully submit that the motions to dismiss appeals B to N inclusive herein are not well taken, and that such motion ought to be denied as to each said appeal.

Dated: February 3, 1943.

Respectfully submitted,

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